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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

2130 LEAVENWORTH HOMEOWNERS ASSOCIATION, Plaintiff and Appellant, v. STATE FARM INSURANCE COMPANY, Defendant and Respondent.	A109367 (San Francisco County Super. Ct. No. 415760)

Appellant 2130 Leavenworth Homeowners Association ("Association") appeals the judgment following a jury trial on its insurance coverage claim against State Farm Insurance Company ("State Farm"). We affirm.

OVERVIEW

State Farm denied first party coverage to its insured, the Association, under a condominium property and liability insurance policy ("condominium policy") for repairs to a concrete foundation wall forming part of the Association's property. The wall had bulged against the neighboring property. State Farm also denied a third party claim against the Association by the owner of the neighboring property under the defense of statute of limitations. After the San Francisco Department of Building Inspection ("Building Inspection") issued an Order of Abatement, the Association paid for the necessary repairs to the concrete retaining wall with its own funds.

The Association sued State Farm for breach of contract and the implied covenant of good faith and fair dealing. The trial court ruled no first party coverage and no indemnification for third party claims applied under the condominium policy. However, the trial court ruled that under the condominium policy State Farm owed the Association a duty to defend in the proceedings by Building Inspection. The jury returned a special verdict finding: (1) the Association did not tender notice of the Building Inspection claim to State Farm, and (2) State Farm did not breach its duty to defend the Association against the neighbor's third party claim. The Association appeals the trial court's rulings and the jury findings.

FACTS AND PROCEDURE

A. Pre-Litigation Stage

Harold Wong owns 2138 Leavenworth Street, situated next door to the Association's property. On October 6, 2000, Wong first notified the Association in writing that a basement foundation wall on its property had bulged and was protruding into his building at mid-basement level. Paul Staricco, president of the Association and occupant of the unit (#14) affected by the bulging wall, commissioned a structural engineering report. On August 7, 2001, Luis Sanchez of Gamayo, Sanchez & Associates, Inc., submitted a report on "the movement of the north exterior concrete wall located below the second floor level and towards the adjacent wood frame building to the north." Sanchez stated the construction of the wall "is quite unconventional" because it "is not laterally restrained at the top (unit 14 floor level), therefore this wall is an unrestrained retaining wall, more than 15 [feet] in height and is also receiving surcharge load from the floor of unit 14." Sanchez observed "the top of the wall appears to be laterally supported by the adjacent building" and opined repairs should be effected "reasonably soon" or else "this wall will continue moving and very serious damage to this and the adjacent building could result."

The Association submitted a claim under its State Farm condominium property and liability insurance policy ("condominium policy"). State Farm commissioned a report by Alan R. Horeis, Structural Engineers, Inc. On August 21, 2001, Horeis submitted a report. The Horeis report noted that about 9-10 months previously there had been a water leak from the shower in Unit 3 above the unit occupied by Paul Staricco.[1] The report noted "apart from the rotation, no obvious distress was observed in the wall itself." The bulging was at its "most pronounced" at the point "where the wall bears against the neighboring building." At this point, "the wall was found to be out of plumb 1½ inches in 4 feet, uniformly from top to bottom." The report stated "the rotation of the wall is most probably the result of old age and inadequate original design and/or construction to assure successful long-term performance." The report noted "the wall is quite tall, and unrestrained at the top" with "no tie backs" in evidence. The report opined that "the rotation of the wall has most probably occurred progressively over the life of the building, . . . there has been no appreciable recent movement of the retaining wall, . . . [and] [¶] the shower leakage from Unit 3 had no affect [sic] on the rotation of the retaining wall." Based on the Horeis report, State Farm denied the Association's claim by letter of August 27, 2001, stating the condominium policy did not cover loss from wear, tear, settling, cracking, and inadequate design or maintenance.

On January 11, 2002, the Association's current counsel, Jordan Stanzler, wrote to State Farm requesting reconsideration of denial of coverage on basis of "loss mitigation" and on account of "imminent danger of collapse." On January 23, 2002, State Farm wrote back to Stanzler affirming denial of coverage and denying it had overlooked

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[1] Mechele Pruitt, the occupant of Unit 3, submitted a claim to State Farm under her own policy for damages caused by the leak to her and Staricco's apartments. Subsequently, the Association agreed to State Farm paying out on Pruitt's claim under the Association's policy.

coverage for imminent collapse. This letter also asked Stanzler or the Association to notify State Farm "if and when a third party claim is made in this matter."

Subsequently, Harold Wong, owner of the adjacent property threatened by the bulging wall, complained to the San Francisco Department of Building Inspection ("Building Inspection") about the problem. The Department issued a Notice of Violation (NOV) on March 6, 2002. The NOV noted the north exterior wall of 2130 Leavenworth was buckling outward and leaning against the adjacent property. The NOV ordered that the Association shall, within seven days, obtain "a licensed structural engineer and contractor to provide a report regarding the integrity and connection of the foundation wall for the north exterior wall." On March 18, 2002, Wong's counsel, Howard Chung, wrote to Stanzler serving "notice to you and your client that the referenced property is encroaching across the property line of the Wong property." Chung stated Building Inspection had issued a NOV, and enclosed a copy of the NOV for Stanzler's reference. Chung demanded that: (1) he and Wong get a copy of the report by the structural engineer; (2) he and Wong get a copy of the permit and plans for the repairs; (3) the Wong property be inspected by a structural engineer to determine the extent of any damage caused by the encroachment; (4) the Wong property be repaired to Wong's satisfaction and all Wong's expenses in connection with the matter be reimbursed.

On March 20, 2002, Stanzler notified State Farm of Wong's third party claim. Stanzler wrote to State Farm, enclosing a copy of Chung's letter together with its NOV attachment. Stanzler's cover letter stated: "Enclosed is a letter from a neighbor who asserts that the building at 2130 Leavenworth is encroaching on his property. Such a claim is covered by your policy. We ask you to accept coverage for it."

Subsequently, State Farm commissioned a report on the Wong property at 2138 Leavenworth Street by Alan R. Horeis, Structural Engineers, Inc ("Wong report"). The Wong report, dated April 11, 2002, describes the adjacent Association property as a "wood framed structure . . . atop a concrete foundation system that steps down the slope

to the east such that concrete retaining walls along the north side of the structure are immediately adjacent to the south property line of the Wong property. . . . The concrete retaining wall is rotated top to the north such that the air-space between the two structures does not exist. The top of the concrete retaining wall from the 2130 Leavenworth property is encroaching onto the Wong property and 'pushing' against the Wong structure. . . . ¶ In Figure 5 one can see that tie-backs have been installed in the eastern end of the north property line retaining wall at 2130 Leavenworth. According to Mr. Wong these were installed 3-4 years ago." The report opined encroachment of the Association property's concrete retaining wall "has caused localized distortions to the wood deck, and main structure framing near the southeast corner of the Wong property where the retaining wall is imparting forces on the Wong structure." The report also recommended the Association's retaining wall "should be stabilized and if possible removed in the area of localized distress of the Wong structure."

State Farm denied Wong's third party claim by letter of May 22, 2002. Claim Specialist Casey Kimball informed Howard Chung State Farm had concluded its investigation and had decided to "deny[] liability based upon the fact that the damage occurred over three years ago and therefore the statute of limitations has expired." Kimball also copied this letter to the Association. It is undisputed Wong never filed suit against the Association or any of its members in pursuit of his claim for repairs.

On May 23, 2002, Stanzler wrote to State Farm demanding clarification on its denial of third party coverage and demanding a copy of the Horeis structural report. In her reply, Casey Kimball, State Farm claims specialist, referred Stanzler to Horeis's initial report of August 2001, which had been provided to the Association along with State Farm's denial letter of August 27, 2001. Kimball stated: "We direct you to that report for the conclusion that the damage occurred over three years ago and, therefore, the property damage statute of three years has expired."

On May 31, 2002, Building Inspection issued a notice of hearing on June 20, 2002, regarding the NOV. Subsequent to the Association's failure to appear at the hearing, Building Inspection issued an Order of Abatement on June 26, 2002, declaring the condition of the structure at 2130 Leavenworth an unsafe building or a public nuisance. On September 5, 2002, Q.S.E. Construction submitted to Paul Staricco a cost estimate for repairs to the retaining wall in the amount of $136,435. In the end, the Association incurred costs of approximately $220,000 in making necessary repairs to the retaining wall.

B. Post-Litigation Stage

On December 16, 2002, the Association filed a complaint against State Farm and its agent Carlos Bermudez seeking damages for breach of contract by State Farm, breach of the covenant of good faith and fair dealing by State Farm, and violation of Business and Professions Code section 17200 by all defendants. On March 21, 2003, the Association filed a First Amended Complaint adding a claim for negligent misrepresentation against Bermudez only.

On September 8, 2003, Stanzler wrote to State Farm's counsel enclosing a report from structural engineer Thomas H. Lutge dated September 5, 2003. The report states the Lutge firm supervised repairs to the "subject foundation per all approved permit drawings." The report states: "The existing exterior foundation wall that failed outward failed as a result of the interior dry fill soils becoming wet from an internal water leak and these wet fill soils exerted horizontal pressures greatly exceeding that of the original dry soils." Stanzler stated the Lutge report showed water leakage caused the bulging, asserted water leakage as a covered loss, and requested State Farm reconsider its denial of coverage. In a letter dated December 24, 2003, State Farm stated Horeis Structural Engineers had reviewed the Lutge report. The letter also stated the Lutge report "did not

provide us with any additional information which would change our engineer's findings, therefore our coverage decision remains the same."

Meanwhile, State Farm filed a motion for summary judgment on October 10, 2003. The Association submitted a declaration by Thomas Lutge in opposition to summary judgment (Lutge Declaration). In his declaration, Lutge attached his previous report but restated his opinion that the cause of the wall rotation "is not movement of soil or earth, or expansion of soil or earth. The soil became wet, which in turn exerted hydrostatic pressure upon the wall, and caused the wall to rotate." On February 5, 2004, the trial court denied summary judgment because State Farm "failed to shift the burden of proof that there are no triable issues of fact on both the 'first party' and 'third party' claims."

On February 17, 2004, the trial court returned to the issue of first party coverage in a hearing on pre-trial motions. The Association argued the bulge in the concrete retaining wall was caused by wet earth putting pressure on the wall, as described in the Lutge Declaration. The trial court ruled there was no first party coverage under the Condominium Policy because "all the potential causes of damage are excluded by one or more exclusions which we've talked about." The trial court explained that "under any theory of how this damage was caused, one or more of [the policy] exclusions will capture it." In addition, the trial court ruled Building Inspection's NOV and abatement proceedings against the Association constituted a "claim" under the condominium policy. Further construing the policy, the trial court also ruled State Farm had no duty to indemnify the Association against the claim by Building Inspection because the claim did not seek damages in a court of law. However, the trial court ruled State Farm had a duty to defend the Association against the claim.

Trial commenced on February 25, 2004. The trial court judge explained the nature of the case to the jury as follows: "The question is whether State Farm is obligated to repay the Association for the amount it spent to repair the wall and remove it from the

next door neighbor's property. ¶ The State Farm Insurance policy includes two different kinds of coverage. The first kind is called first-party insurance and is intended to cover damage to the Association's own property. The second kind of coverage is called third-party, or liability, insurance. Liability insurance or third party insurance is intended to cover the Association for damages it causes to the property of someone else. The liability coverage of the State Farm policy has two different obligations. One is that State Farm will pay the amount the Association is required to pay to a third party for damages that are covered under the policy. This obligation is called the duty to indemnify. The other obligation is that State Farm will pay the cost of defending the association against claims or suits that are potentially covered under the policy. This obligation is referred to as a duty to defend, and this is what we are concerned with in this case. [¶] . . . [¶] [T]he issue in this case is whether State Farm breached its obligation to defend the Association against the claims made by the neighbor and/or the City [of San Francisco Building Department]."

On March 5, 2004, the jury returned a Special Verdict. The jury answered only the first of four questions put to it regarding the Department of Building Inspection proceedings: "Did the 2130 Leavenworth Homeowners Association tender the City administrative proceeding to State Farm?" The jury answered, "No." Similarly, the jury answered only the first of five questions put to it regarding the Wong claim: "Did State Farm breach its obligation to defend the Homeowners Association with respect to the Wong claim?" The jury answered: "No."

On November 18, 2004, the trial court entered its tentative statement of decision on the Business and Professions Code section 17200 claim. On December 21, 2004, the Association filed a motion for a new trial and for judgment notwithstanding the verdict (JNOV). On February 10, 2005, the trial court issued an order denying the Association's motion for new trial and JNOV. The Association timely filed its Notice of Appeal the same day.

DISCUSSION

A. First Party Coverage

The Association contends the trial court erred by ruling no first party coverage applied under the condominium policy for repairs to the bulging concrete foundation wall. Specifically, the Association contends the bulging in the wall was caused by pressure of wet soil, not the pressure of water alone. The Association states the basement floor was earthen, and contends the addition of water to the earthen floor created "a new and different peril—pressure from wet soil," which is not excluded under the policy.

The trial court's ruling on this coverage issue is subject to our independent review. (See *Certain Underwriters at Lloyd's of London v. Superior Court* (2001) 24 Cal.4th 945, 972 (*Powerine I*) [Court of Appeal correctly applied independent review to "the superior court's order denying summary adjudication of the issue of the London Insurers' duty to indemnify"].) The parties disputed causation in the trial court. Relying on the Lutge Declaration and report, the Association contended the rotation of the wall was caused by the hydrostatic pressure of wet soils. In contrast, the Horeis report commissioned by State Farm opined the rotation in the wall was "most probably the result of old age and inadequate original design and/or construction to assure successful long-term performance." The trial court ruled that under either theory of causation the rotation of the wall was excluded under the condominium policy. We agree with the trial court's determination.

The condominium policy is in two parts: Section I describes Property Coverage and Section II describes coverage under Comprehensive Business Liability. Section I states "we will pay for accidental direct physical loss to buildings at the premises described in the Declarations caused by an insured loss." Section I also specifies losses which are not insured under the condominium policy, including: "earth movement, meaning the sinking, rising, shifting, expanding or contracting of earth, all whether combined with water or not ('earth-movement exclusion'); [¶] . . . [¶] "water, such as

. . . natural water below the surface of the ground, including water which exerts pressure on, or seeps or leaks through: (a) foundations, walls, floors or paved surfaces; (b) basements, whether paved or not; or (c) doors, windows, or other openings ('water exclusion').

Section I also states the policy does not provide insurance "for loss either consisting of, or directly and immediately caused by, one or more of the following: . . . ¶ b. smog, wear, tear, . . . decay, deterioration, hidden or latent defect or any quality in property that causes it to damage or destroy itself ('defect exclusion'); . . . f. settling, cracking, shrinking, bulging or expansion ('bulging exclusion'); . . . k. continuous or repeated seepage or leakage of water that occurs over a period of time ('leakage exclusion').

All potential theories of causation identified by the parties are captured in the above loss exclusions. If water caused the earth to expand and move, thereby causing the concrete wall to rotate, the loss is excluded under the earth-movement exclusion. If the hydrostatic pressure of wet soil caused the wall to rotate, then the loss is excluded under the water exclusion. If the earthen basement soil grew wet due to the seepage or leakage of water occurring over a period of time and so caused the wall to rotate, then the loss is excluded under the leakage exclusion. And, without belaboring this any further, whatever caused the wall to bulge, the loss consisted of "bulging" and is therefore excluded under the bulging exclusion. Accordingly, the trial court's ruling on first-party coverage must stand.

B. Building Inspection Claim

We first address the Association's claims: (1) the undisputed facts show it tendered Building Inspection's claim to State Farm; (2) State Farm received a copy of the NOV and therefore suffered no prejudice by any lack of notice; (3) State Farm waived the right to assert lack of notice by never acknowledging the NOV; and (4) State

Farm breached the duty to defend and settle Building Inspection's claim. These contentions all fail if, as found by the jury, the Association did not tender the Building Inspection claim to State Farm.

We review the Association's challenge to the jury verdict, and to the trial court's denial of its motion for judgment notwithstanding the verdict, for substantial evidence. (See *Carter v. CB Richard Ellis, Inc.* (2004) 122 Cal.App.4th 1313, 1320 [denial of motion for JNOV reviewed for substantial evidence]; *Hill v. City of Long Beach* (1995) 33 Cal.App.4th 1684, 1687 [jury verdict reviewed for substantial evidence].) We consider the evidence in the light most favorable to the prevailing party and indulge all legitimate and reasonable inferences to uphold the jury verdict if possible. (See *Sanchez-Corea v. Bank of America* (1985) 38 Cal.3d 892, 907.)

1. Evidence Regarding Tender

The record shows State Farm received a copy of the NOV from the Association's counsel, Stanzler, in a letter dated March 20, 2002. Stanzler's letter stated: "Enclosed is a letter from a neighbor who asserts that the building at 2130 Leavenworth is encroaching on his property. Such a claim is covered by your policy. We ask you to accept coverage for it." The "letter from a neighbor" was actually a letter from the neighbor's (Wong's) counsel, Howard Chung of Corporate Counsel Law Group, LLP. Chung's letter of March 18, 2002, to Stanzler stated: "This letter shall serve as notice to you and your client that the referenced property is encroaching across the property line of the Wong property." Chung stated Building Inspection had issued a NOV, and enclosed a copy of the NOV for Stanzler's reference. Chung's letter contained further demands as recited above. (See *ante*.)

As this shows, the NOV was an attachment to Chung's letter, and Chung's letter was an attachment to Stanzler's letter to State Farm. In other words, State Farm received the NOV as an attachment to an attachment to a cover letter written by Stanzler, which

did not mention the NOV or the Building Inspection proceedings at all. Stanzler's letter does not mention a "claim" by Building Inspection. The only "claim" mentioned in Stanzler's letter is one by a "neighbor who asserts that the building at 2130 Leavenworth is encroaching on his property." Stanzler's letter asserts "[s]uch a claim is covered by your policy," suggesting a single claim, not two separate claims (one by Wong and one by Building Inspection). Stanzler asks State Farm to "accept coverage" for this single claim by Wong. The letter contains not a whit to suggest the Association was requesting State Farm to provide either defense or indemnification for the Building Inspection proceedings.

Casey Kimball, State Farm Claims Specialist, testified on behalf of the Association about how she handled the Wong claim submitted by Stanzler. Kimball stated she first called Stanzler's office and spoke with him to introduce herself and "to acknowledge receipt of a potential third-party claim made by the Wongs against our policyholders which is the Association." She then discussed the claim with her superior at the time, Craig Fisher, Team Manager. Fisher suggested she hire the Horeis firm for a structural survey on the Wong property because that firm was familiar with the properties in question. Next, she contacted Wong's counsel, Howard Chung, introduced herself, and requested permission for the structural engineer hired by State Farm to contact Wong directly to arrange access. Kimball sent Chung a confirming letter acknowledging receipt of the claim and stating it was under investigation. After Kimball received the engineering report from the Horeis firm, she reviewed it with Team Manager Craig Fisher. Fisher asked Kimball to contact the engineer to clarify when the Association building had last been painted and get a time-line for when the damage occurred. Horeis informed Kimball any damage was at least three to four years old. Kimball reported her discussion with Horeis to Fisher, and Fisher decided State Farm should deny the liability claim made by the Wongs against the Association based on the three-year statute of limitations. Kimball then sent a denial letter to the Wongs.

Fisher also testified for the Association about the communication from Wong. Fisher acknowledged the communication contained a copy of the NOV and he knew the Association faced proceedings by Building Inspection to fix the wall. He stated he never thought to tell the Association whether or not they were covered for such a claim because "Mr. Chung's letter never asked for any kind of defense of this [NOV] document." On cross-exam, Fisher stated he could not determine from Stanzler's letter what claim was being submitted, so he had to refer to Chung's letter, which set forth Mr. Wong's demands. Fisher further testified Stanzler's letter did not ask for any action on the enclosed NOV, and Stanzler did not ask him to do anything with respect to the NOV in any later correspondence.

In addition, Edward McKinnon provided expert testimony for State Farm on the matter of claims handling. McKinnon testified that in his opinion no claims adjuster would understand Stanzler's letter was asking the insurance company to provide a defense for the NOV claim. When asked for his opinion on how claims handlers in the industry deal with notices of violation, McKinnon stated: "I have never seen . . . an insurance company defending a notice of violation from a building department. . . . I've never heard of it. I've never, even seen a file in which this has ever been tendered to an insurance company. So, in my opinion no claim adjuster would ever recognize that this was being—what was being asked of them or what was allegedly being asked—unless the letter clearly set it out. It is just not within the experience of people in the claim business. If something like this were to happen, it would be so unique, it would circulate around the entire insurance claim industry."

We conclude the manner in which Stanzler submitted the NOV to State Farm, together with the testimony of Fisher and McKinnon, provides substantial evidence to support the jury's finding the Association did not tender the Building Inspection claim to State Farm. Accordingly, because State Farm did not receive notice of the Building Inspection claim, the contentions set forth above must fail.

2. State Farm's Right to Assert Defense of Lack of Notice

The Association further contends State Farm could not assert the defense of lack of notice to the Building Inspection claim. The Association relies on the doctrine an insurance company cannot assert lack of compliance with the notice provisions of the policy where it has already denied coverage under the policy. (See, e.g., *Shell Oil Co. v. Winterthur Swiss Ins. Co.* (1993) 12 Cal.App.4th 715, at p. 762 ["The law is established that where an insurance company denies liability under a policy which it has issued, it waives any claim that the notice provisions of the policy have not been complied with"].)

The Association asserts State Farm denied coverage for removal of the wall on January 23, 2002, before it even received Wong's claim from Stanzler on March 20, 2002. State Farm's letter of January 23, 2002, was written to Stanzler in response to his request State Farm reconsider its denial of first-party coverage and instead grant coverage for "imminent collapse, coverage for loss mitigation, and damage to third party property." State Farm's letter stated: "[Y]ou have also submitted that there is a third-party liability coverage in this matter, such that State Farm must pay the cost of the retaining wall in order to prevent future damage to neighboring property. . . . In this claim, there has been no claim made against the insured by any third party, and of course there has been no determination that the insured is legally obligated to pay any sums as damages." Thus, State Farm did not deny all liability for third party claims before receipt of the Wong claim. In fact, the letter stated: "If and when a third party claim is made in this matter, we ask you or your client to notify us and we will be happy to consider it and respond appropriately." Accordingly, the Association's contention fails as a matter of fact.

3. Jury Instructions on Tender

The Association, joined by *amicus curiae*, also contends the jury instruction on the issue of notice was erroneous. United Policyholders, *amicus curiae* in support of

appellant Association, contends the trial court's instruction created a new and heightened notice standard. We review challenges to the propriety of jury instructions de novo. (*Miller v. Weitzen* (2005) 133 Cal.App.4th 732, 736, fn. 3.)

The condominium policy itself does not define "notice." Rather, it states: "If a claim is made or a **suit** is brought against any insured, you must see to it that we receive prompt written notice of the claim or **suit**." The trial court instructed the jury as follows: "An insured's obligation to defend does not arise until the policyholder gives notice of the claim to the insurer. This has been referred to in this case as a tender of the claim. A policyholder tenders a claim to its insured by giving notice to the insurer that reasonably informs the insurer that a third-party has made a claim against the policyholder and that the policyholder expects some action from the insurance company. [¶] You must decide whether the information given to State Farm and the manner in which it was given in this case was sufficient to constitute a tender or was such as to require State Farm to make further inquiry." (Bold text in original.)

One authority states: "For purposes of the unfair claims settlement practices regulations promulgated by the Department of Insurance, 'notice of claim' generally means any . . . notification . . . that reasonably apprises the insurer that the claimant wishes to make a claim against the policy . . . , and that a condition giving rise to the insurer's obligations under that policy . . . may have arisen. For purposes of these regulations the term 'notice of claim' does not include any written or oral communications provided by an insured . . . solely for informational or incident reporting purposes. Although this definition is not controlling for purposes of determining coverage, it is instructive because it does indicate the minimum standards that trigger the insurer's statutory obligation under the Unfair Practices Act, [California] Ins[urance] Code section 790.03(h)." (4 Cal. Insurance Law & Practices (Matthew Bender, 2006) ch. 41, §§ 41.65[5], 41.65[6], Liability Insurance, pp. 41-152.1 - 41-152.2, footnote omitted.) We find this definition helpful in assessing the trial court's jury instruction on

notice. Seen against this definition, the trial court's instruction provides sensible guidance to the jury in resolving the factual dispute before it within applicable legal standards.

The Association attempts to skirt the issue of notice by asserting it did not have to ask State Farm to undertake defense of the claim, citing *Samson v. Transamerica Insurance Co.* (1981) 30 Cal.3d 220. That is true. But the Association *did* have to notify State Farm it was making a claim, and the evidence supports the jury's finding it did not do so. We also reject the Association's assertion it provided State Farm constructive notice of the claim by Building Inspection. The doctrine of constructive notice places a duty on the insurer to make further inquiry if it receives a claim lacking in specificity. (See *California Shoppers, Inc. v. Royal Globe Ins. Co.* (1985) 175 Cal.App.3d 1, 37.) If the insurer fails to make such further reasonable inquiry, then "given the appropriate circumstances, the law will charge a party with notice of all those facts which he might have ascertained had he diligently pursued the requisite inquiry." (*Ibid.*) Here, Stanzler sent the NOV to State Farm as an attachment to an attachment and made no mention of it in his cover letter. Kimball fulfilled any duty of further inquiry by contacting Stanzler personally by telephone to discuss the nature of the claim. Under these circumstances we decline to impose constructive notice on State Farm.[2]

The Association also asserts the trial court "committed further error when it instructed the jury to disregard the Wong claim (which physically attached the City's

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[2] The Association also contends State Farm waived "the 'no lawsuit' defense by repudiating its policy" and failing to communicate with the Association about the Building Inspection claim. It is unclear what the Association means by State Farm's "no lawsuit" defense. The defense was not offered at trial nor was the jury instructed on such a defense. The Association may be alluding to trial testimony by Fisher that State Farm would have defended the Association if the Wong had filed suit against the Association. But State Farm did not assert a "no lawsuit" defense to the Wong claim—it denied the Wong claim based on the statute of limitations.

Notice of Violation Complaint). According to the Association, this prevented the jury from even considering Building Inspection's NOV because it was attached to the Wong claim. This assertion is baseless. The trial court instructed the jury to disregard "claim handling issues" arising out of Wong's own first-party claim on his State Farm policy. Chung's letter on behalf of Wong, together with the NOV attachment, were admitted into evidence, and State Farm's handling of Wong's third-party claim was submitted to the jury. This claim of error fails.

C. State Farm's Duty to Defend and Indemnify the Building Inspection Claim

1. Applicability of Powerine I

The Association and *amicus curiae* contend the trial court erred by finding the condominium policy did not impose a duty on State Farm to indemnify the Association in Building Inspection's abatement proceedings. As noted, the trial court ruled the policy carried a duty to defend, but not a duty to indemnify, with respect to those proceedings. State Farm does not challenge the trial court's ruling.

The trial court based its indemnification ruling on *Powerine I*. In *Powerine I*, the U.S. Environmental Protection Agency (EPA) instituted a proceeding against Powerine, an oil refining business, for the cleanup of a contaminated site. Powerine demanded its insurers defend and indemnify it in the EPA proceedings. The insurers sued for declaratory relief that they owed no duty to defend or indemnify Powerine. (*Powerine I, supra,* 24 Cal.4th at pp. 951-952.) Subsequently, the Supreme Court reviewed whether the Court of Appeal correctly determined the insurers had no duty to indemnify Powerine in the EPA proceedings. (*Id.* at pp. 954-955.) The Supreme Court framed the issue as "whether the insurer's duty to indemnify the insured 'for all sums that the insured becomes legally obligated to pay as damages,' as imposed by the standard comprehensive general liability policy [SCGLP], is limited to money ordered by a court." (*Id.* at p. 955.)

In addressing the issue, the Supreme Court looked back to its earlier decision in *Foster-Gardner, Inc. v. National Union Fire Ins. Co.* (1998) 18 Cal.4th 857 (*Foster-Gardner*). The Court observed that in *Foster-Gardner* "we addressed the question, which was of first impression in the State of California, whether the insurer's duty to defend the insured in a 'suit seeking damages' was limited to a civil action prosecuted in a court. We answered in the affirmative. We went on to conclude that the duty did not extend to a proceeding conducted before an administrative agency pursuant to an environmental statute." (*Powerine I*, *supra*, 24 Cal.4th at p. 951.) The Court described "*Foster-Gardner's* 'syllogism' " as follows: "The duty to defend is broader than the duty to indemnify. The duty to defend is not broad enough to extend beyond a 'suit,' i.e., a civil action prosecuted in a court, but rather is limited thereto. A fortiori, the duty to indemnify is not broad enough to extend beyond 'damages,' i.e., money ordered by a court, but rather is limited thereto." (*Id.* at pp. 960-961.) The Court stated *Foster-Gardner*'s syllogism alone supported the Court's conclusion "that the insurer's duty to indemnify the insured for 'all sums that the insured becomes legally obligated to pay as damages' under the [SCGLP] insurance policy is limited to money ordered by a court." (*Id.* at p. 960.)

Nonetheless, the Court "look[ed] beyond *Foster-Gardner*'s syllogism," and found other support for its holding under a "narrower focus" on the language of the SCGLP itself, as well as a "wider focus on the standard policy within the legal and broader culture." (*Powerine I, supra,* 24 Cal.4th at pp. 961-962.) In terms of the "narrower focus on the [SCGLP] itself," the Court noted the "provision imposing the duty to defend expressly links 'damages' to a 'suit,' [while] . . . the provision imposing the duty to indemnify impliedly links 'damages' to a 'suit.' (*Id.* at pp. 961-962.) In terms of the wider focus, the court noted the duty to indemnify under the standard SCGLP "runs to 'all sums that the insured becomes legally obligated to pay *as damages*.' [¶] 'Damages' exist traditionally inside of court." (*Id.* at p. 962, Italics in original.) Consequently, the

court restated "the insurer's duty to indemnify the insured for 'all sums that the insured becomes legally obligated to pay as damages' is limited to money ordered by a court. It does not extend to all sums, or even any sum, that the insured becomes legally obligated to pay other than as damages." (*Id.* at p. 964.) The court concluded: "In light of the foregoing, we believe that the duty to indemnify does not extend to any expenses required by an administrative agency pursuant to an environmental statute." (*Id.* at p. 966.)

In this case, the trial court applied *Powerine I* to rule no indemnification was available under the policy for the Building Inspection abatement action because it was not a proceeding in a court of law. The Association and *amicus curiae* contend on various grounds *Powerine I* does not control here.

The Association and a*micus curiae* focus on the differences in language between the SCGLP and the State Farm policy at issue here. They note the State Farm policy agrees to defend "any claim or suit" whereas the SCGLP language in both *Foster-Gardner* and *Powerine I* agreed to defend only "any suit." Also, they note the State Farm policy, unlike the SCGLP at issue in *Foster-Gardner* and *Powerine I*, defines "suit" to include not only civil proceedings instituted in a court of law but also certain arbitration and alternate dispute resolution proceedings. They contend these differences obligate State Farm to indemnify the Association for the "claim" asserted by Building Inspection in its abatement proceedings.

Admittedly, these differences in policy language mean the *Foster-Gardner* syllogism is not present in this case because under State Farm's policy the duty to defend *does* extend beyond a 'suit' to a 'claim.' Also, the defense and indemnification provisions in the condominium policy are not linked by the term "suit" in the same way as the SCGLP. (*Powerine I, supra,* 24 Cal.4th at pp. 961-962.) But these differences do not destroy the applicability of *Powerine I.* In the first place, while the duty to indemnify and the duty to defend are "correlative," they are not "coterminous," so that "[w]here

there is a duty to defend, there *may* be a duty to indemnify." (*Id.* at p. 958.) More importantly, the Court in *Powerine I* also acknowledged the traditional understanding " 'damages' exist . . . inside of court . . . [whereas] 'harm' exists . . . outside of court." (*Id.* at p. 962.) Therefore, because the indemnification language in the condominium policy is exactly the same as the indemnification language interpreted in *Powerine I*, (see *Powerine I, supra*, 24 Cal.4th at p. 955.), we decline to depart from *Powerine I*'s holding that the insurer's duty to indemnify under this policy language "is limited to money ordered by a court." (*Powerine I, supra,* 24 Cal.4th at p. 960.)[3] Accordingly, we endorse the trial court's ruling State Farm had no duty to indemnify the Association in Building Inspection's abatement proceedings.[4]

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[3] With our leave, appellant after oral argument submitted for our consideration *Keystone Consolidated Industries, Inc. v. Employers Insurance Company of Wausau* (*Keystone*) (7th Cir. 2006) 456 F.3d 758. This case is inapposite because it does not address the issue of notice for a claim, and on the issue of indemnification is inconsistent with California law. (Cf. *Powerine I, supra,* 24 Cal.4th at pp. 961-966 ["the insurer's duty to indemnify the insured for 'all sums that the insured becomes legally obligated to pay as damages' is limited to money ordered by a court. It does not extend to all sums, or even any sum, that the insured becomes legally obligated to pay other than as damages (*Id.* at p. 964) [and] ". . . does not extend to any expenses required by an administrative agency pursuant to an environmental statute" (*Id.* at p. 966)] with *Keystone, supra,* 456 F.3d at pp. 765-766 [legal obligation to pay damages may be triggered by "some claim or articulated demand assert[ing] a legal obligation on the part of Keystone to remediate the environmental contamination"].)

[4] We reject the contention by both the Association and *amicus curiae* that *Powerine Oil Company, Inc. v. Superior Court* (2005) 37 Cal.4th 377 (*Powerine II*) affects the applicability of *Powerine I.* In *Powerine II*, the Supreme Court considered whether excess insurers' obligation to indemnity Powerine was similarly limited to "money ordered by a court in a suit for damages against the insured." (*Powerine II, supra,* 37 Cal.4th at p. 382. The Court concluded the indemnity obligation of excess insurers was not similarly limited because the policies agreed to indemnify not only for "damages" but also for "*expenses, all as more fully defined by the term 'ultimate net loss.' "* . . . 'Ultimate net loss' in turn is defined as the total sum which the Insured or any company as his insurer, or both, becomes 'obligated to pay by reason of [] property damage [] either through adjudication *or compromise, and shall also include* [] *all sums paid* [] for litigation, *settlement, adjustment and investigation of claims and suits.' "* (*Id.* at pp. 395-

2. Alternate Dispute Resolution

The Association advances various other contentions in an effort to place the condominium policy outside the reach of *Powerine I*. The Association contends the Building Inspection abatement proceedings constitute "alternate dispute resolution" proceedings and therefore fall under the policy's definition of a suit. To say the Association's interpretation of "alternate dispute resolution" is elastic would be an understatement. The policy defines "suit" as "a civil proceeding in a court of law in which damages because of . . . property damage . . . to which this insurance applies are alleged. "Suit" includes "(1) an arbitration proceeding in which such damages are claimed and to which you must submit or do submit with our consent; (2) any other dispute resolution proceeding in which such damages are claimed and to which you submit with our consent." "Alternate dispute resolution proceeding" is not further defined in the policy, but that alone does not make the term ambiguous. (*Foster-Gardner, supra*, 18 Cal.4th at p. 868.) We must construe the term "alternate dispute resolution" within the structure and context of the policy language as a whole. (See *id.* at pp. 868-869.) The policy does not provide a laundry list of which proceedings constitute a suit. Rather, it first defines "suit" as a "civil proceeding in a court of law" and then states a "suit" may include, under certain conditions, "an arbitration proceeding" or an "alternate dispute resolution proceeding." This means an arbitration or alternate dispute resolution proceeding will fall within the definition of suit when it is related to, or serves as a substitute for, "a civil proceeding in a court of law." It certainly does not include an administrative action launched by a government agency to enforce codes and regulations like the Building Inspection abatement proceedings in this case.

396, italics in original.) Unlike the language in the excess policies in *Powerine II*, the indemnification language in the State Farm policy here is identical to the indemnification language at issue in *Powerine I*.

3. AIU

The Association also contends the question of indemnification for the Building Inspection proceedings is controlled by *AIU Insurance Company v. Superior Court* (1990) 51 Cal.3d 807 (*AIU*) rather than *Powerine I.* Specifically, the Association asserts Building Inspection's power under the abatement proceedings is akin to the government's power to seek reimbursement costs for environmental cleanup, which the Supreme Court ruled was covered by the policy in *AIU*.

In *AIU*, the Supreme Court faced the issue of whether insurers were obligated to provide coverage under their comprehensive general liability (CGL) policies to a corporation (FMC) for any environmental cleanup and response costs awarded in third-party suits against FMC by U.S. and local administrative agencies under environmental laws. (See *AIU, supra,* 51 Cal.3d at pp. 813-815.) In addressing this issue, the Court resolved three questions determinative to coverage. First, the Court held FMC would be "legally obligated" to pay cleanup costs by any adverse orders issued in the third-party suits because "legally obligated" includes equitable relief like injunctive relief and recovery of response costs. (*Id.* at p. 818.) Second, the Court held the response costs, including reimbursement of government response costs and the costs of compliance with injunctions, constitute "damages" under the CGL policies. (See *id.* at pp. 825-842.) Third, the Court held government claims for injunctive relief and environmental cleanup costs, with the exception of prophylactic costs, allege "property damage" under the CGL policies. (See *id.* at pp. 842-843.) The Association contends *AIU* applies here because, like FMC, the Association faced an action by a government agency, the order to abate constitutes "damages," and those "damages" occurred "because of property damage."

We reject this analogy. The crucial procedural distinction between *AIU* and the situation here is that the third-party suits brought by the U.S. and local agencies were civil proceedings filed in a court of law. (*AIU, supra,* 51 Cal.3d at p. 815 ["agencies filed suits against FMC, seeking relief for alleged violations of CERCLA" and other

environmental laws].) In contrast, the abatement procedures in this case were not civil proceedings filed in a court of law. In other words, *AIU* fully comports with the court's later holding in *Powerine I* that the duty to indemnify extends only to money ordered by a court. Indeed, with respect to its holding the *Powerine I* court stated: "Not to the contrary is *AIU*. There, we held to the effect that the duty to indemnify may embrace all money ordered by a court, including 'money that the insured must give under law as compensation to third parties' and also 'money that the insured must itself expend in equity in order to provide relief of the same sort.' [Citation.] We did not hold that the duty extends to any money in addition to that ordered by a court — including any expenses required by an administrative agency pursuant to an environmental statute. Indeed, we did not even consider the issue." (*Powerine I, supra,* 24 Cal.4th at p. 966, italics omitted.) In sum, this argument lacks merit.

4. Administrative Agency Power to Award Damages

Moreover, we are unmoved by the Association's assertion the Supreme Court has recognized administrative agencies do sometimes award damages. However, in none of the cases cited by the Association for this proposition did the Supreme Court address coverage for such "damages" under a policy of liability insurance. (See *Cruz v. PacifiCare Health Systems, Inc.* (2003) 30 Cal.4th 303 [suit by an enrollee in a health care plan against health care providers alleging claims for unfair competition]; *Walnut Creek Manor v. Fair Employment & Housing Com.* (1991) 54 Cal.3d 245 [challenge by apartment owner to award of special damages by Fair Employment and Housing Commission for a prospective tenant denied an apartment on the basis of racial and single status; *McHugh v. Santa Monica Rent Control Bd.* (1989) 49 Cal.3d 348 [defining adjudicative powers of the city's rent control charter under the judicial powers clause of the California Constitution].) And even though *Powerine I* acknowledged " 'damages' have begun to appear in some administrative agencies," it emphasized that "within the

standard policy, 'damages' exist *solely* inside of court." (*Powerine I*, *supra*, 24 Cal.4th at p. 969.) Likewise, we reject the Association's suggestion *Powerine I* does not apply to the condominium policy because it excludes "damages other than money damages" in the section on Directors and Officers Liability (D&O). First, the condominium policy's D&O coverage has the same indemnification provision as the Business Liability Section (and *Powerine I*): "We will pay those sums that the insured becomes legally obligated to pay as damages because of 'wrongful acts.' " Therefore, whatever the policy is attempting to exclude under D&O coverage as "damages other than money damages," *Powerine I* still limits indemnification to money ordered by a court.

5. Loss Mitigation

The Association also contends the "doctrine of loss mitigation" applies, such that State Farm had a duty to pay for repairs to the Association's building, to stop further encroachment on the Wong property even in the absence of a third-party suit. The Association asserts the trial court erred by failing to instruct on its loss mitigation theory and in excluding its expert's testimony on this subject. We disagree.

The cases cited by the Association in support of its "loss mitigation doctrine" are all concerned with whether different types of mitigation or remediation measures qualify as "damages to property" under the insurance policy in question. Thus, in *Globe Indem. Co. v. State of California* (1974) 43 Cal.App.3d 745, 749-753, the court held an insurer was obligated to pay for the costs of fire suppression sought by the State in a suit against the insured after the insured negligently started a forest fire; in *AIU* the Supreme Court held that in environmental suits government agencies can recover response costs as "damages" even though "government response costs are incurred largely to prevent damage . . . from spreading to government or third-party property, (*AIU, supra*, 51 Cal.3d at p. 833; and in *Watts Industries, Inc. v. Zurich American Insurance Co.* (2004) 121 Cal.App.4th 1029, 1042-1043, the court held an insurer breached its duty to defend

because there was potential for coverage of 'damages because of property damage' in underlying allegations that the insureds' substandard parts led to water contamination and removal of the parts was reasonable "remediation and mitigation" measure.) In other words, none of these cases implicate *Powerine I*'s holding that the duty to indemnify extends only to "money ordered by a court." (*Powerine I, supra,* 24 Cal.4th at pp. 964-965.) Rather, in each of these cases a third-party obtained a judgment against the insured, and the dispute was over which "damages" were covered by the policy in question. Here, by contrast, we have already concluded *Powerine I* precludes any third-party indemnification for any "damages," whether in mitigation or not.[5]

D. Wong Claim

It is unclear whether the Association challenges the jury's special verdict. State Farm did not breach its obligation to defend the Association with respect to the Wong claim. To the extent the Association does challenge the special verdict, we conclude the verdict is supported by substantial evidence. This is reflected in the testimony of Kimball and Fisher recited above, in which they recount the steps State Farm took in defense of the Wong claim.

The Association contends it was prejudiced by the trial court's evidentiary and instructional rulings with respect to the Wong claim. Specifically, the Association complains the trial court erred by excluding evidence of, and instructing the jury not to consider, any claim handling issues arising from the Association's first party claim,

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[5] The Association cites one out-of-state case, *Leebov v. United States Fidelity & Guaranty Co.*, (Pa. 1960) 165 A.2d 82(*Leebov*) in which a court held mitigation damages not ordered by a court were covered under a general liability policy. In *Leebov*, though, the indemnification provision at issue was broader than the one here. (*Id.* at p. 84 ["The instant policy is not so limited [compared to the standard provision in the State Farm policy]. By its terms the [insurer] agreed to pay such sums as the [insured] became obligated to pay 'by reason of' the liability imposed upon him by law for damages because of injury to or destruction of property"].)

Mechele Pruitt's claim, or Wong's first-party claim. We review the trial court's rulings on evidentiary objections under an abuse of discretion standard. (*Mitchell v. United National Ins. Co.* (2005) 127 Cal.App.4th 457, 467.) Under the abuse of discretion standard, we will reverse only where the trial court's discretionary ruling was arbitrary or capricious, resulting in a miscarriage of justice. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 331.)

The trial court instructed as follows: "I've already determined that the Association's first-party claims was [sic] not covered under the State Farm policy, and you are not to concern yourself with any claim handling issues arising out of the Association's first-party claims, Mechele Pruitt's own claim under her individual policy, or the claim of Harold Wong. Those issues are not relevant in determining whether State Farm had a duty to defend any claims brought under the third-party coverage it provided to the Association." We have already concluded the trial court was correct in its determination no first-party coverage was available to the Association under the condominium policy. And with that ruling, the trial court narrowed the issues for trial to State Farm's handling of Wong's third-party claim and Building Inspection's NOV claim for repairs to the concrete foundation wall. Accordingly, the trial court did not abuse its discretion by ruling as irrelevant claim-handling issues arising from Mechele Pruitt's claim for property damage for a leaky shower in her own apartment and the Wong's first party claim for property damage to their own building. Moreover, the trial court limited its ruling to "claim handling issues." The jury was free to give whatever weight it saw fit to the testimony of Mechele Pruitt, the testimony of Helen Chue (Mr. Wong's spouse), and those parts of the Pruitt file admitted into evidence in relation to other issues in the case.

The Association also claims even if (as found by the jury) State Farm defended Wong's third-party claim, State Farm is still liable for settlement of the Wong's third-

party claim. Specifically, the Association contends because State Farm defended without reserving its rights the Association was entitled to settle with Wong on its own terms.

The Association relies on the principle that "the insurer's unconditional defense of an action brought against its insured constitutes a waiver of the terms of the policy and an estoppel of the insurer to assert such grounds." (*Stonewall Ins. Co. v. City of Palos Verdes Estates* (1996) 46 Cal.App.4th 1810, 1839.) The Association's reliance is misplaced. Here, State Farm's defense of Wong's third party claim was never put to the test because Wong never filed suit. And the Association's claim it "settled" Wong's claim is wholly without foundation. There is no record evidence whatsoever of any communication between the Association and Wong in settlement of the Wong's claim against the Association. Indeed, Paul Staricco testified the repair work was done to comply with the City's requirements, the Association was never sued by Wong, the Association never entered into a settlement agreement with Wong, and the Association never paid Wong anything. Accordingly, we reject this claim.

E. Section 17200 Claim

On November 18, 2004, the trial court entered its post-trial ruling on the Association's Offer of Proof on its Business and Professions Code section 17200 claim against State Farm for unfair business practices. The trial court denied the Offer of Proof as untimely. The trial court stated the Offer of Proof sought to "litigate this [Business and Professions Code section 17200] issue under two new contentions which were not raised in the original complaint or in pretrial discovery." The new theories as identified by the trial court were (1) State Farm improperly denied coverage to the Wongs under the Wong's own State Farm insurance policy; and, (2) State Farm's California Coverage Reference Manual badly misstates California law on mitigation and leads State Farm to deny claims wrongfully on a state-wide basis. The trial court reasoned the Association's "original [Business and Professions Code section] 17200 theory was based on State

Farm's refusal to provide first and third-party coverage under [the Association's] insurance policy. [The Association]'s new theories . . . constitute different claims rather than [] more specific allegations of existing claims and will require additional evidence. . . ." Analogizing the Association's Offer of Proof to a late attempt to amend the pleadings, the trial court rejected the Offer of Proof as untimely.

In its opening brief, the Association completely ignores the trial court's ruling. Instead of pointing to alleged error in the trial court's ruling, the Association simply reiterates what the trial court described as its two new theories about how State Farm's practices allegedly violate Business and Professions Code section 17200. In its reply brief, the Association contends for the first time the trial court erroneously dismissed its Offer of Proof as untimely. We have the discretion to deem an alleged error to have been waived if asserted only in the reply brief and not the opening brief. (*Stoll v. Shuff* (1994) 22 Cal.App.4th 22, 25, fn. 1.) Here, the Association failed to address the basis of the trial court's ruling in any way in its opening brief. Accordingly, we deem any error has been waived.

DISPOSITION

The judgment is affirmed. Appellant shall bear costs on appeal.

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Parrilli, J.

We concur:

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McGuiness, P. J.

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Siggins, J.